

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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In the Matter of

Amendment of the Commission's
Rules To Preempt State And Local
Regulation of Tower Siting For
Commercial Mobile Services Providers

RM - 8577

To: The Commission

KATHLEEN P. HAWK'S COMMENTS ON THE CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION'S PETITION FOR RULE MAKING

Kathleen P. Hawk
122 Thornwood Road
Butler, PA, 16001
(412) 287-5343

March 6, 1995

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List **A B C D E**

Kathleen P. Hawk presents the herein comments in opposition to the CIRA Petition For Rule Making, RM-8577 As A private citizen, As A consultant to citizens groups And planning agencies, As A qualified expert by Pennsylvania rules of court, And As A victim of hypersensitivity to Abnormal electromagnetic frequencies And in support thereof Avers As follows:

1. The CIRA requests amendment of the Commission's rules to preempt state and local regulation of tower siting for commercial mobile services And providers.

2. Petition filed December 22, 1994 sites, As the premise for request, tower siting restrictions imposed by zoning regulations (Aesthetics). While it fails to specifically address radiation hazard concerns, it does call them into play by reference (footnote (4), page 2) to the Petition for Further Notice of Proposed Rulemaking in E9 Docket 93-62, filed by the Electromagnetic Energy Alliance, also filed on December 22, 1994.

3. On January 18, 1995 the FCC issued Public Notice, Report No. 2052, January 18, 1995 seeking pro and con statements relative to CIRA petition.

4. Kathleen P. Hawk respectfully requests notification of all future hearings And/or opportunity to comment as well as notification of rulemaking with respect to either CIRA or E9A petition

5. On February , 1995 Kathleen P. Hawk requested that the FCC extend the comment/statement period. Having had no communication to the contrary it is assumed that the customary 90 day extension is applicable,

6. Zoning is A very complicated, specialized field of expertise with which even most attorneys Agree requires exceptional study and understanding of the

multitude of complexities involved in compatibility and orderly development.

7. Just as the Commission has been extremely careful to preface all statements associated with radiation hazards preferring instead to defer to an appropriate health agency, Kathleen P. Hawk likewise seriously questions the ability of the FCC in matters as complex as zoning. What does the FCC know about zoning? Will the FCC institute a similar disclaimer in the event zoning is pre-empted? If so, it will most certainly open up a legal abyss which is certain to dwarf any other in the history of the United States including asbestos.

8. Having been the victim of a perceived inadequate zoning ordinance, a corrupt zoning hearing board, the fraudulent, flagrant, unethical abuse of law by Bell Atlantic Mobile Systems (almost five (5) years with no end in sight), and the abuse of power and willingness of the FCC to break its own rules and requirements (even those relating to the bold-print perjury clause on its application forms as well as those pertaining to settlement agreements and partnerships) favoring its licensee no-matter-what, Kathleen P. Hawk is eminently qualified to make the unqualified statement that Adequate zoning is imperative.

9. CITIA Petition proposes to destroy America. As a descendent of one of only four (4) forefathers who signed both the Declaration of Independence and the Constitution, I take very seriously our hard fought inherent rights of acquiring, possessing and protecting property and of enjoying and defending life. The rule of private property rights is the right to say who uses my property and in what fashion. That's liberty. Both the CITIA and the ERTA petitions form an egregious attack, a grave injustice and a lavish display of corporate infringement on those rights that we cannot tolerate if we are to preserve our rights as citizens.

10. CITIA Petition, Page 8 contains revealing, deliberate, self serving misinterpretation of Congressional revision of the Communications Act,

§332 specifically, "To give full scope to the congressional mandate, it is necessary to construe narrowly Congress' reservation of zoning authority to the states." POPPYCOCK! Congress does not have that right statutorily, constitutionally or any other way. It would be violation of the 10th Amendment. Neither did the state tell us we can zone. Specific proof from the CIRA is demanded. In fact, zoning power may well be one of the powers specifically reserved to the people.

11. Having worked closely with citizens groups and planners in most of the states, it has been the experience of Kathleen P. Hawk that the majority of zoning regulations opt to structure where a commercial communications tower can go through use of zoning districts (commercial, industrial, etc) and through set-back requirements (1,000', 2,000' etc) rather than through radiation emission standards primarily because more and more people are waking up to the fact that ANSI guidelines are grossly inadequate.

Only if you accept the premise that the only health effect is due to heating, only then is the ANSI/IEEE standard perhaps only marginally OK. The problem is, it's very difficult, if not impossible, to quantitate heating in a person's or animal's body. Only to the extent that you can reduce the guidelines significantly below the level where any part of the body is heated might it be acceptable. But, speaking as one who has read thousands of pieces of literature, Kathleen P. Hawk firmly believes that ANSI thermal basis is strictly an outmoded concept. Not too many full brained people who look into what's available in the literature, will accept the fact that heating is the only thing that can happen. And, since that throws the whole safety standard wide open, municipalities have shied away from setting arbitrary emission standards or acceptance of ANSI/IEEE guidelines and instead choose to go with conventional zoning policies (districts, set-backs, etc.).

Speaking as one who is hypersensitive to abnormal electromagnetic frequencies, Kathleen P. Hawk wishes to underscore the fact that for those who are hypersensitive, it makes no difference what the standard is. Consulting with those who suffer similar hypersensitivities, not only in the U.S. but

Also in Canada, U.K., Australia, Austria, Denmark, Sweden and Germany, all with similar symptoms, it's clear that health concerns from RF/MW towers are escalating. People lose their health, then their job, then their homes. Unable to work many become the burden of the government,

The Specific Absorption Rate is another perceived problem in that it was a concept evoked to try to use data that was obtained from a small mouse (optimally absorbing at about 3 GHz) and then relate that to what happens in a human being (adult male maximum of approximately 80 MHz and child between 150 to 300 MHz depending upon size). The concept that the body is a conductor, oriented perpendicular to the earth's surface, therefore acts as an antenna, so you can use the SAR/antenna theory is merely a simple-minded approach to attempt to utilize biological data from different species. SAR is an engineering construct that perhaps should not be used to try to normalize exposures at different frequencies. It's an approach - it's an approximation that Kathleen P. Hawk, as well as a growing number of informed people, believes to be grossly inadequate.

If you had the same absorption in an adult, as opposed to a child, would there be differences in effects? Would a child be more or less sensitive? The data is not yet available so that question can't be answered. But there is no valid reason to expect that there wouldn't be differences because there are differences in a lot of other physiological responses of adults vs. children because the physiology is different. Therefore they very well might react differently to exposure, but exactly, in a particular case, you really wouldn't know. The underdeveloped immunological system particularly of young children is more sensitive to affect than an adult would be. As the scientific community is saying they don't know, citizen groups and planners stay away from the subject and go with zoning laws instead.

Another reason citizen groups and planners fall back on zoning laws as protection is suspicion that, in spite of the intention of the cellular system to direct the radiation through a perfect antenna from point "A" to point "B", leakage known as side-lobes exists. By virtue of the very way the antenna operates - sending electrons up and down the structure or around a dish - the fields are interacting with the antenna itself and they are producing radiation that goes off in different angles other than the intended

angle. It's unintended leakage but it exists. Side-lobes are a radiation by-product. If you have a very low power antenna, the leakage can be minimal. If you have a very high powered antenna, the leakage can be very high. And taking the fact that microwaves bind to wires into consideration, great care must be given when regarding siting in residential areas where exposure can be as much as twenty-four (24) hours a day.

Obviously the magnitude of exposure often depends on proximity to the source and the greater the absorption (the greater the dose the greater the risk) but there's one other factor which is seldom addressed if not never addressed by the FCC. It's a very rare case where a tower either houses just one frequency, intensity, power, or radio system. A typical tower may be the base station for paging, data transmission, cellular telephone, community repeater, etc. The possibilities are endless. The radiation is additive. It is not possible to call the FCC, give co-ordinates for a tower and have the agent at the other end give a total. The municipality/individual is always told that each system, individually licensed, operates within/below the ANSI standard. This attitude sends a red flag when the FCC doesn't know. How is the municipality to establish a safe level if not through zoning? And indeed, how is the individual to determine what level of emission is acceptable to him/her? Children are held captive to adult management of their space. They can't move.

Every six (6) months or every time the researchers go grubbing for research money significant evidence that athermal bioeffects at both low frequency and radio frequency exposures, where tissue heating is not the basis of interaction, slips out not entirely un-noticed by the public/zoners/planners. All exposures proposed by the CTA in the range of 800 MHz to low GHz are athermal. So the models, mechanisms and biological effects used to explain physical interactions simply cannot be based on heating models which are the very heart and soul of both old and new ANSI/IEEE guidelines.

The United States Environmental Protection Agency, which does have a mandate to protect the health of the American public, responded on November 9, 1993 to FCC NPRM, ET Docket 93-62 on Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation by stressing its disagreement (through EPA Report 600/883-026 F) and the disagreement of the NCRP (through

NCRP Report No. 86) with the proposed ANSI/IEEE document which fails to allow for variation in sensitivity to RF radiation. The EPA disagreed with the ANSI statement, "that there is no reliable evidence that certain subgroups of the population (such as infants, aged, ill and disabled, persons dependent on medication, persons in adverse environmental conditions (excessive heat and/or humidity, voluntary vs. involuntary exposure) are more at risk than others (IEEE 1991, p. 23). The FDA, and the NRPS agreed with the EPA and the NCRP and as the EPA response states: the "International Electrotechnical Commission 1993 guidelines define groups of people who are less heat tolerant than others. These include the elderly, infants, pregnant women, and people who are obese, have hypertension, or take drugs such as diuretics, tranquilizers, sedatives, or vasodilators that decrease heat tolerance."

Kathleen P. Hawk stresses the above merely to point out that the best way to care for the above vulnerable segments of the population is through zoning.

12. CFA summary at page iii states, "... Congress intended to prohibit state entry barriers, whether direct or indirect, which have the purpose or effect of barring commercial mobile radio services," Kathleen P. Hawk hopes that the FCC is smarter than to buy into that hustle but, just in case, it should be underscored that any ordinance which attempts to bar any use entirely, is deemed "exclusionary" which is illegal and, where or if this occurs, the company could proceed on that basis. As previously stated, most ordinances strive mainly to protect residential areas from any type of commercial intrusion.

13. CFA Petition, Page 5, footnote 10 misinterprets 47 U.S.C. § 332 (A) (2), (A) (3) to include all commercial radio systems serves to emphasize a serious case of Private-Envy. Private radio (me communicating with my 7 trucks) is entirely different than common carrier (selling air time to thousands of subscribers). One cannot logically infer that the word "private" was intended to include all mobile services. This theory is seriously at odds with the Statutory Construction principles and a real stretch.

14. One of the primary purposes and intent of all zoning is to protect health, safety and welfare. As previously noted, the Commission has been very careful, in its disclaimer, to establish that it is not a health agency and would prefer to defer to one when addressing biological/radiation issues. If the FCC were to adopt the CTIA petition, it would most certainly be in the position of proving, beyond all doubt, that there is absolutely no possibility of harm from any FCC authorized system to anyone in any environment. That is not just an unenviable position, it's impossible. But it would be necessary in order to preempt any document with those specifically stated goals.

The World Health Organization definition of health as a complete state of physical, emotional and mental well-being, and not just the absence of disease would undoubtedly come into play. As such both emotional effects (such symptoms as feelings of fear, anxiety, hopelessness, depression, guilt, and post-traumatic stress disorder) and cognitive effects (such as symptoms of decreased concentration, memory impairment and slowed mental processing) would have to be considered from the psychological standpoint of individuals exposed to such installations and who must try to cope with varying amounts of uncertainty about their situation. The greater the degree of uncertainty, the less able an individual becomes to make the appropriate adaptational responses. As uncertainty rises, threat and fear also increase. The worst kind of threat is fear of the unknown.

Threat is a psychological state in which a person has decided by virtue of his/her perception of a situation that a present event indicates that something harmful will happen in the future. Threat, intensified by lack of clear information on exposure, ultimately becomes the source of severe psychological stress. This is a normal response in this situation and it is happening right now nationwide.

The human body instinctively responds to stress with a series of physical reactions designed to cope with threat presented as a stressor. Various body systems prepare for fight or flight. But if the stress persists without relief for the body, the body systems become fatigued and various physical symptoms begin to appear with an abbreviated list of somatic disorders associated with the consequences of chronic stress being: hypertension, irritable bowel syndrome, muscle tension, tension headaches, sleep disturbances, Raynaud's disease, migraine headaches, palpitations, dizziness, sexual dysfunction, and immune system weakness.

The physical disorder is related either primarily or secondarily, or both to the initial source of the stress. The main causes of the psychological reactions are the uncertainties of the situation, the lack of control over it, and the consequent threat.

There also occurs a more generalized threat to the overall life-~~scap~~e - a person's view of his entire world including himself and all components of the environment around him - his health, family and home. The threat of exposure to an invisible RF/MW hazard profoundly affects all of these areas. The environment becomes viewed as spoiled with the individual resident having no control over it. What was a safe home is now a malevolent environment. Furthermore, they see their futures and the futures of their children forever changed or destroyed by this intrusion. As a result, they feel threatened and at risk for these future losses.

Psychological impacts have already started to occur because the threat already exists. Stress is mounting and becoming chronic. The FCC can check that in almost any residential area where a RF/MW tower exists, Kathleen P. Hawk can verify from experience that multiple variables connected with associated hazards lead the average resident to experience some degree of threat from the possibility of having a source of radiation in close proximity.

By now, residents have been exposed to numerous newspaper and magazine articles, TV and radio programs, books, and peer education stating that there is a link between exposure and the development of cancer, neurological disorders, etc. There is conflicting information regarding the efficacy of that claim, but it comes primarily from the industry that has the most to gain financially from providing the opposite view. Therefore, the motives of this source and the source itself are distrusted. Often the FCC is likewise perceived. The uncertainty that develops around the controversy only serves to heighten the threat, fear and apprehension. From a psychological standpoint, this is a reasonable and rational reaction to invisible environmental.

Effect On Elderly. Older residents, who had expected to retire in their current homes, or pass them on to their children, have to reconsider. What they had hoped to do was leave their children with something of value to them, not just monetarily, but also emotionally, because their homes had always represented

stability, comfort, and safety for them. Now these same homesteads are monetarily devalued and fraught with uncertainty and danger. Not only do they lose the ability to will to their children a financially valuable asset, but they also lose the ability to care for their future emotional well being. Older people need stability and familiarity. They don't cope well with change. Although they have the option of selling and moving, they do so at the expense of stability and security. But staying is equally unsettling due to the fear of adverse health effects or the loss of certain comforting aspects of their environment. The psychological consequences, observed by Kathleen P. Hawk, of this conflict include sadness, depression, grief and anxiety.

15. The CITA Petition is quick to point out economic concerns to its industry as reason to grant its request. However, the FCC need only check with a realtor in the Butler, PA. area to be certain that potential home buyers near the BAMS tower either refuse to purchase homes in the exclusive architecturally designed Meadowood Plan or they use the tower as a bargaining chip to drive down the price. There is talk of holding hearings to reduce taxes. Eventually this will erode the tax base and will have to be picked up by the community as a whole.

But there are additional indirect costs which the FCC must consider again relative to the psychological / physical standpoint. One major indirect cost is lost man-hours at work. For each hour visit to a physician's or psychologist's office, there is either a potential loss of three (3) man-hours on the job, or the need to provide temporary help. The increased cost to business and decreased productivity will have an economic impact.

There is also an emotional cost. Families begin to divert monies which would normally have been spent on family needs but now go to attorneys, medical needs, research contacts and materials, and to the general fight against the contaminant tower. Meetings and research take up time at the expense of time with family or children. This is a major interference with the needs of children to be with their parents as well as adult children to spend time with their elderly parents.

Intra strain and stress within the family puts extra stress on relationships

which exacerbate marital or family problems. It's generally recognized in the mental health community that as family stress increases so does the incidence of domestic violence. This can, in turn, lead to other costs associated with treatment, estrangement or divorce, and suicide. It's difficult to measure in dollars, but the cost is excessive.

There is also cost to the community. A migration of young adults out of the community in response to the environmental tower-contaminant may seriously effect future leadership or restrict new families from moving into a certain area. Again, the tax base is eroded. Membership in community and charitable groups diminishes, which, in turn, will seriously affect previously established budgets if there is a decrease in paying members, congregants or givers. This leads to a decrease in services provided by organizations, which may, in turn, have a profound effect on the community.

There is a serious cost associated with a future weakening in the trust of our organizations, both governmental and private. People tend to want to participate less when they feel that their impact is meaningless. They feel betrayed, victimized and helpless. This undermines the degree of participation in local government which seriously hurts the process. The sense of distrust with industry, government, FCC, within the neighborhood community or organization tends to polarize, causing anger, disruption, and ultimately results in antagonism around all areas of interaction. The FCC must weigh all of the foregoing specified costs and not just those its licensees must incur dealing with the zoning process.

Another cost which promises to be felt more often in the future with the advent of constructing towers / antennas on churches, municipal property and school property is the cost of loss of tax exempt status for the above named entering into commercial contracts with FCC licensees.

16. The FCC must consider another primary purpose of zoning as it considers any proposal to preempt zoning requirements - that is the orderly, compatible, coordinated and practical community development and the preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, floodplains and aquifers. Words like blow-torch and

blight upon the landscape come to mind. There should be no doubt that RF/mw towers, sometimes 500' tall are not compatible with one and two story homes.

The CTIA petition is the perfect recipe for a zoning earthquake which would deny ^{the} state and municipality the ability to refuse permits which would effectively change zoning at a time when voters overwhelmingly endorse freedom from the feds and more power to the people. The CTIA and EIA Petitions if adopted would decrease the power of the people/state. They propose larceny of municipal authority to boot. And what does the FCC know about zoning or health.

It's not all that difficult to see how we got to this point. Nationwide, municipalities are enacting restrictions largely protective of residential neighborhoods where no such restrictions existed before in response to local concern. Kathleen P. Hawk has assisted with the enactment of many such ordinances. In the past applicants for tower siting have been able to trick local zoning boards, in areas where a zoning ordinance did exist, with a statement that the applicant had a federal license (which is not quite a license to steal - but close). What quasi judicial agency wants to tangle with anything federal? Indeed, what state court? But as municipalities began adopting prohibitive ordinances, the magic of possession of a federal license began to fade. The cellular industry, which has always had the advantage, simply refuses to play on a level field. Instead of acting as a good neighbor in the community and working with the municipality in an attempt to fit in, the cellular/pcs industry has instead chosen to declare war on the neighbors threatening to turn residential neighborhoods into kill-the-neighbor-theme-parks.

17. As a conservative republican, Kathleen P. Hawk wishes nothing but the best for the cellular industry and hopes that it will earn as much money as is legally, morally and ethically possible - but not ^{at} the expense of health and/or the residential and protected districts of our country. The cellular industry provides a needed service so there is a need for an intelligent solution which Hawk believes to be the use of overlay zones which would provide for sensible development of telecommunication towers.

18. In general, Kathleen P. Hawk disagrees with the legal interpretations set forth in the CJA Petition throughout,

19. Kathleen P. Hawk hereby adopts any and all legal opinion and argument set forth on pages one (1) through seven (7) of the National Resources Defense Council prepared by Katherine Kennedy, Esquire, Senior Attorney and submitted to the FCC on February 16, 1995 attached here as Attachment "A".

WHEREFORE, Kathleen P. Hawk hereby respectfully requests, for the foregoing reasons, that the FCC deny the CJA petition. Should the Commission require more information, please feel free to contact the undersigned.

Respectfully submitted,

By Kathleen P. Hawk

Kathleen P. Hawk

122 Thornwood Road

Butler, PA. 16001

(412) 287-5343 (phone)

(412) 285-3605 (fax)

March 6, 1995

Original and 4 copies via first class mail, postage prepaid to Secretary of the Commission, FCC, 1919 M Street, N.W., Washington, D.C. 20554,

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To: The Commission

NATURAL RESOURCES DEFENSE COUNCIL'S COMMENTS ON
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION'S
PETITION FOR RULE MAKING

Katherine Kennedy
Senior Attorney
Natural Resources Defense
Council
40 W. 20th St.
New York, New York 10011
(212) 727-4463

February 16, 1995

Attachment "A"

The Natural Resources Defense Council ("NRDC") respectfully submits these comments in opposition to the Cellular Telecommunications Industry Association ("CTIA") Petition for Rule Making, RM-8577. NRDC is a national environmental advocacy organization with over 130,000 members. NRDC has a long history of involvement in local government matters, including the promotion of reasonable zoning regulations that protect the environment and public health.

NRDC only recently received a copy of the CTIA petition. Because of the short time remaining before the deadline for public comment, NRDC respectfully seeks permission to supplement its comments in a further submission, if further research necessitates such a submission.

Finally, NRDC requests that we receive notice of all future hearings or opportunities for comment with respect to the CTIA petition and that the Commission notify NRDC of any rulemaking associated with this petition.

I. POLICY CONSIDERATIONS

In its petition, CTIA asks the Commission to propose rules that would preempt state and local governments from enforcing zoning and other regulations governing the siting and construction of commercial mobile radio service ("CMRS") towers. The Commission should deny the petition because it strikes at the heart of the power of municipalities and states to develop zoning rules that will protect the environment and public health.

As a matter of policy, state and local governments should not be restrained in exercising their authority to issue and

enforce zoning regulations that protect aesthetic, health and economic interests and that promote the public interest. Because the siting of CMRS towers can implicate all of these concerns, state and local governments should be allowed to issue and enforce zoning regulations with respect to CMRS tower siting, just as they can zone to protect communities from any other type of facility that could have an adverse impact if improperly located.¹

Under Section 332(a) of the Communications Act, 47 U.S.C. § 332(a), the first factor that the Commission must consider in determining whether to take an action is whether such action will "promote the safety of life and property." The preemption of state and local zoning siting regulations, which have been carefully crafted to protect public health, environmental and property values, would harm, rather than promote, "the safety of life and property." Moreover, CTIA has produced no hard evidence that such siting regulations are actually conflicting with the other factors enumerated in Section 332, such as the encouragement of competition and the provision of services to the largest feasible number of users.

¹ NRDC will not address in these comments the issues raised in the Electromagnetic Energy Association's December 22nd petition, submitted in ET Docket No. 93-62, requesting that the FCC preempt state and local regulation of radiofrequency emissions. It is NRDC's understanding that the Commission has not yet established a public comment period for this petition. We request that the Commission notify us when and if a public comment period is established for the EEA petition.

II. SECTION 332 OF THE ACT EXPLICITLY GIVES THE STATES THE POWER TO REGULATE "THE OTHER TERMS AND CONDITIONS OF COMMERCIAL MOBILE SERVICES," INCLUDING ZONING.

Section 332(c)(3) of the Communications Act explicitly states that:

no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3) (emphasis added).

Thus, under Section 332, states and localities are barred from regulating "the entry of or the rates charged by" CMRS providers, but can regulate "the other terms and conditions of commercial mobile services." Zoning and siting regulations clearly fall into the category of "other terms and conditions." Indeed, CTIA appears to concede this point by stating that the legislative history of the Act "specifically references 'facilities siting issues (e.g., zoning)' as 'terms and conditions within the state's purview.'" CTIA Petition at 7, n.16.

Moreover, zoning and siting regulations do not concern the entry of CMRS providers into the market or into the state, nor do they concern rates. CTIA's argument to the contrary makes little sense. Under CTIA's interpretation, regulation of "entry" would include any regulation that might generate any degree of inconvenience, cost or delay for the CMRS industry. This interpretation would effectively read out of existence Congress' explicit provision that states and localities remain free to

regulate "the other terms and conditions of commercial mobile services." In sum, CTIA argues that "other terms and conditions" should be interpreted narrowly and "entry" should be interpreted broadly, whereas the natural reading of the statute dictates the opposite.

The CTIA petition also argues at length that preemption of zoning and siting regulations is required in order to fulfill Congress' goal of creating an efficient CMRS infrastructure. CTIA Petition at 4-10. These policy arguments are unavailing in light of Congress' explicit direction -- enacted in 1993 -- that states should be allowed to regulate "other terms and conditions," including zoning. Moreover, as is discussed above at 1, CTIA's policy arguments do not hold water. First, Congress' stated goals in Section 332 of fostering efficiency and competition in the CMRS market must be balanced against its first goal: the promotion of "the safety of life and property." 47 U.S.C. § 332(a). Second, while Congress clearly has indicated an interest in creating efficient and competitive CMRS markets, CTIA has not demonstrated why legitimate state and local siting regulations cut against this interest. Other efficient and competitive industries are subject to zoning regulations: CMRS providers should be as well. Indeed, a willingness to respect rather than flout the authority and land use preferences of the local communities that CMRS providers seek to serve might well build a stronger industry in the long run.

III. SECTION 2(b) OF THE COMMUNICATIONS ACT PROVIDES FURTHER REASON NOT TO PREEMPT TOWER SITING REGULATIONS.

Section 2(b) of the Act, 47 U.S.C. § 152(b), provides further reason for denial of the CTIA petition. This section states that the Commission has no jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Id.

As the Supreme Court has held in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986), section 2(b) is a "substantive jurisdictional limitation on the FCC's power," 476 U.S. at 373, that:

fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.

Id. at 370.

CTIA attempts to distinguish its petition from the purview of Louisiana by arguing that preemption is justified under the "impossibility" standard because it is impossible to separate out the interstate and intrastate components of the Commission's regulation. CTIA Petition at 13. But CTIA provides no support for this argument except to assert generally that zoning and siting regulations for CMRS towers "directly impinge upon interstate communications." This statement is unproven and is inconsistent with Louisiana's holding, which specifically rejected the argument that the Commission could regulate an

intrastate matter because it might affect interstate communications. The Louisiana court determined to reject FCC preemption despite the argument that state regulation would:

have a severe impact on the interstate communications network because investment in plant will be recovered too slowly or not at all, with the result that new investment will be discouraged to the detriment of the entire network.

476 U.S. at 373.

IV. THE COMMISSION DECISIONS CITED BY CTIA ARE NOT ON POINT.

CTIA cites several Commission decisions to preempt state regulation as precedent supporting its petition. These citations are not on point. The examples cited by CTIA, which concern earth stations, amateur radio antennas and multichannel distribution services, are not mobile services that come within Section 332's ambit. Thus, the Commission was not faced, as it is here, with Congress' explicit direction that states and localities retain authority to regulate zoning issues. Moreover, the preemption effected by the Commission in those regulations is far more narrowly crafted than the preemption that the CTIA petition apparently seeks.

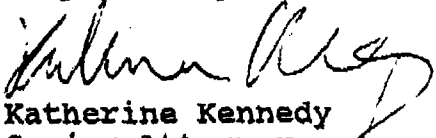
For example, CTIA cites the Commission's decision to preempt state zoning regulations aimed at earth stations. But the regulation in question, 47 C.F.R. § 25.104, applies only to zoning regulations "that differentiate between satellite receive-only antennas and other types of antenna facilities." And, the regulation exempts such zoning regulations where they have (1) "a

reasonable and clearly defined health, safety or aesthetic objective"; and (2) "[d]o not operate to impose unreasonable limitations on" such antennas." In contrast, CTIA has not made the case in its petition that state and local authorities are discriminating against CMRS towers and other types of towers of the same size and with the same radioactive emissions.

CONCLUSION

For all the reasons stated above, NRDC respectfully requests that the Commission deny the CTIA petition.

Respectfully Submitted,


Katherine Kennedy
Senior Attorney

Natural Resources Defense
Council
40 W. 20th St.
New York, New York 10011

New York, New York
February 16, 1995